No. 93-128

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

Petitioner,

vs.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Arkansas Supreme Court

REPLY BRIEF FOR PETITIONER

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I.

THE CONSTITUTIONAL VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS WAS TIMELY FILED.

Respondent insinuates that Petitioner has not timely raised a violation of his right to due process, and cites what it purports to be the only example of same having been raised in support of its position. The Respondent is not being forthright with this Court. The Petitioner raised this issue numerous times before the Arkansas Supreme Court: (a) in the *Brief in Support of Motion for Vacatur, et al.*, filed on January 19, 1993; (b) *Petition and Brief for Rehearing*, filed on January 22, 1993; (c) *Reply to Appellants' Brief in Response to Motion for Vacatur, et al.* filed on or about February 4, 1993; (d) *Motion for Reconsideration* filed on or about February 18, 1993; and (e) *Motion for Stay* filed on or about February 18, 1993. A Petition for Writ of Certiorari should be as short and concise as possible. The Petitioner did not include in his abstract every pleading in which the due process violations were raised. However, a review of the Petitioner's Appendix at 14a, 21a, and 26a, and the Respondent's Appendix at 42a, clearly shows that this argument was adequately raised and presented vigorously.

II.

THE FACTS SUPPORTING THE APPEARANCE OF AN IMPROPRIETY WERE ADEQUATELY PRESENTED THROUGH THE BEST MEANS AVAILABLE, AND WILL ULTIMATELY BE INDEPENDENTLY VERIFIED.

Counsel for the Respondent next calls counsel for the Petitioner a liar and a coward, indicating that Petitioner's counsel "hid" behind a letter "purportedly" authored by his client, and insinuating that same was actually written by him because it contains the same "typeset" as the *Motion for Vacatur, et al.* These

accusations are totally false, and Petitioner's counsel resents same. As soon as this issue surfaced, Petitioner naturally picked up the phone and called his attorney. As one might expect, an intensive investigation into the facts, and legal research into the applicable law, ensued. It was after the initial shock that Petitioner placed his position in a letter and forwarded same to his counsel. The letter, and prior conversations between Petitioner's counsel and the Petitioner, compelled Petitioner's counsel to investigate same, and compelled the call for public disclosure.

Petitioner's counsel spoke to Herschel Friday, who himself admitted that the Chief Justice had quail hunted on his private land, as a private guest, immediately prior to the rendition of the Opinion overturning this jury verdict. Furthermore, Mr. Friday impliedly admitted upon direct questioning that he had hunted with the Chief Justice immediately after Christmas, 1992 in the State of Texas on privately leased lands. These activities were not part of a group, attendance of a church or civic club with numerous other individuals, etc. They are not part of an accepted and public casual "friendship by general association" that does not mandate recusal or disclosure. They were private, exclusive outings. (*See* Respondent's Appendix 6, page 44a).

Furthermore, Mr. Walter E. Simpson, former Chief of Police of Little Rock, Arkansas, and William R. Wilson, Jr., former President of the Arkansas Bar Association, were hunting in the same area in Texas as Mr. Friday and Judge Holt during the Christmas weekend of 1992. Both of these individuals are aware that Mr. Friday and Judge Holt left the motel for the stated purpose of hunting together on Mr. Friday's hunting lease. This weekend was during the period in which a Petition for Rehearing could be filed in the Supreme Court of Arkansas (as it was). One would be naive to believe that the extent of these social excursions stop and start on the two occasions where eyewitnesses have placed these two individuals together within a week's period of time.

This issue was not raised until after the Opinion in question

was rendered because both excursions not only came to light, *but actually occurred* within a week of the date of said Opinion. How could same have been raised earlier? Does the necessary burden belong to a party to somehow know beforehand about events that should not take place, and should be disclosed in the event they occur by happenstance?

At the very same time Petitioner's counsel is apprised of these facts, he is negotiating with William H. Sutton of the Friday Law Firm in an attempt to settle litigation that was imminent against said firm, and was apprised that said firm is of the opinion that the December 21, 1993 Opinion authored by the Chief Justice insulated it from any exposure or liability to the Estate. These facts were summed up in an Affidavit signed by Petitioner's counsel. (*See* Respondent's Appendix 6, page 44a). What else could be done at that point?

The Respondent asserts that there is no "evidence", nor any "record," that private hunting excursions have occurred during the years between the Chief Justice and Mr. Friday, much less that said excursions occurred while this matter was actually pending on appeal. In fact, Respondent insinuates in footnote 1 on page 12 of their Brief in Opposition that were such evidence present, same would be improper. Petitioner's quandary was simple: How does one make a record of such activities with no subpoena power, no right to take depositions in an appellate setting, and no right to force the Chief Justice of the Arkansas Supreme Court, nor the senior partner of the largest law firm in the State, to voluntarily, unequivocally, and unilaterally disclose the true facts? Lawyers with cases pending before the Arkansas Supreme Court are loathe to sign affidavits which could detrimentally impact their lives and careers, even when they are totally innocent in the manner they acquire said information, and impart same.

The Respondent characterizes the Petitioner's "assertions" as "scandalous and libelous." It is black letter law that the truth is a

defense to any such assertions/causes of action. The aforementioned excursions, while this matter was pending on appeal, are concrete. They will ultimately be documented in the investigation being conducted by the Arkansas Judicial Discipline and Disability Commission. The problem for Petitioner is that the Chief Justice refused to verify same, and the Arkansas Supreme Court refused to issue a stay until same could be independently verified. Petitioner states in good conscience that he has heard, and believes, the extent and depth of the relationship is much more; however, he had unequivocable evidence verifying the excursions at the crucial time when the Opinion in this matter was written, and believes that the exclusive social excursions he can verify mandated recusal, or, at the least, a disclosure. Petitioner's counsel has not taken the cowardly approach; to the contrary, he has stood up for this client at great risk to himself, personally and professionally.

III.

THE IMPACT OF "REMOVING THIS CLOUD" ON OTHER CASES SHOULD BE OF NO MOMENT TO THIS COURT.

The Respondent states in its Brief that if this Court were to hold the above-referenced socializing between the author of an Opinion and an interested party while the matter was pending on Appeal was improper, that same would wreak havoc on the entrenched legal system in the state of Arkansas. "Pandora's box would be opened, and its evils loosened, never to be captured again." (*See* page 11 of Respondents' Brief in Opposition). It is incredulous to Petitioner that the issue would be couched in these terms. The solution to the problem is for the Chief Justice of the State of Arkansas to recognize that there are accepted tradeoffs to occupying that position. Whether or not any cases have to be "reopened" in order to remove a cloud which may be lingering over them if improper social interaction took place should not factor into this Court's decision at all. The issue is what is right and what

is wrong, and who is willing to stand up for it.

IV.

PETITIONER'S CLAIM AGAINST THE FRIDAY FIRM WAS NOT PREDICATED UPON A REVERSAL OF THE JURY VERDICT.

The Respondent states on page 14 of its Brief in Opposition: "By reversing, the door was opened for Petitioner to make a claim against the Friday Firm. Had the Judgment been affirmed, Petitioner would not have had a claim against that firm." In the first place, in circumstances such as those present in the case at bar, the impact of a decision on an interested party is not something one looks at *on the back end.* In the second place, such a statement is absolutely, totally false.

The Complaint the Estate has filed against the Friday Firm alleges numerous acts of negligence, mismanagement, failure to disclose conflicts of interest, etc. perpetrated by that firm against the Estate over a ten-year period. The controversy involving the insurance company is a significant part of the controversy, but it is by *no* means the sum total of same. The Complaint incorporates numerous allegations of improprieties, including, by reference, a sister Complaint filed in Faulkner County Probate Court that is 63 pages long, with 65 exhibits attached to same, all of which involve and entail the improprieties the Friday Firm is alleged to have committed.

Conversely, it goes without saying that had the Arkansas Supreme Court affirmed the verdict the Estate had obtained against the Respondent, thereby conclusively establishing that the Estate was the contractually designated beneficiary of the insurance policy in question, and that the Friday Firm had knowledge of same through its review of the files of its other client, *i.e.*, the Respondent, then the Estate would have been able to possibly

pursue punitive damages against the Friday Firm for its failure to alert it of its claim to the insurance proceeds in question. The predicate act would have established. While the Estate is still intent on pursuing this cause of action against the Friday Law Firm, an upholding of the jury verdict would have made same much easier.

Respondent also falsely accuses the Petitioner of being the "fingerpointer" at the Friday law Firm in the underlying trial in its attempt to now rub elbows with the political brass. It was the *Respondent,* not the *Petitioner,* who first raised the improprieties committed by the Friday Law Firm in a Brief in Support of Motion for Summary Judgment filed early on in the underlying proceedings. The Respondent claimed that the Friday Firm, as attorneys for the Estate, had access to the insurance company's files, and quoted a letter written by James M. Saxton of the Friday Firm on June 27, 1983 to the individual who received the proceeds as follows:

> It appears that factually the policy was issued in your father's name with his Estate as beneficiary; subsequently changed to name you as the owner and beneficiary; then subsequently changed to rename your father as owner and his Estate as beneficiary.

The deposition of Mr. Saxton was quoted as follows:

> [The two memorandums contained in the insurance company's files] both contain language to the effect that the beneficiaries of the Estate may have a potential claim to the life insurance proceeds. . . [*See* Respondent'Appendix, 1a-7a and page 1a of this reply brief.]

The Respondent thereafter concludes in said pleading:

> It is undisputed that the attorneys for the Estate of J.P. Stoltz had knowledge of the Estate's potential claim to the proceeds of the life insurance policies at issue in this lawsuit no later than June 27, 1983. Notice or knowledge of an attorney, acquired during the time he was acting within the scope of his employment, is imputed to his client.

The Petitioner countered this rule of law by proving that the various conflicts of the Friday Law Firm prohibited the imputation of said knowledge to the Estate. However, the Petitioner points these matters out to this court at this time to conclusively show that even the *Respondent* itself has admitted, through its pleadings, that the Friday Law Firm was an interested party in the outcome of these proceedings.

V.

THE REPUTATION AND CLIENT LIST OF THE FRIDAY LAW FIRM, AND PRIOR DECISIONS OF THE ARKANSAS SUPREME COURT INVOLVING SAID FIRM, ARE IRRELEVANT.

Respondent advances as a basis for denying the Petitioner's Petition that the Friday Law Firm is the State's largest firm and that Mr. Herschel Friday is a fine lawyer and a fine man, and that the Friday Firm's clients include many banks and leading businesses. Counsel for Petitioner wholly concurs, but said assertion totally misses the issue. There is no assertion anywhere in the Petitioner's Petition that the Friday Firm is disreputable, or that either Mr. Friday or Judge Holt committed a crime. Such is not alleged, and such is not the standard.

But what they did, under the circumstances, *was* and *is* improper. It creates the appearance of an impropriety, and casts a

cloud over these proceedings that impinges on the integrity of the judicial system. The operative facts stand on their own and speak for themselves. It was not the Petitioner who created this factual scenario, and the Petitioner refuses to feel defensive about bringing same to light.

Likewise, Respondent misses the boat when it begins to preach about other cases decided by the Arkansas Supreme Court wherein the Friday Firm was an interested party. Such an argument again totally misses the thrust of the issue at hand. The case at bar, and the *appearance of an impropriety* created by the facts surrounding same, must stand on their own. The other cases cited by Respondent contain no applicable law to guide this Court, and the facts of same are an attempt to go outside the record. In short, they are irrelevant.

In the first place, none of those cases cited by the Respondent have near the capacity to impugn the Friday Firm as the case at bar. The Friday Firm is not just counsel of record, or even a party-Defendant, in the case at bar. Here, the Friday Firm refused to disclose a claim to a client due to the potential downside of fulfilling its fiduciary obligation, *i.e.* causing numerous other clients it was representing, in the fact or irreconcilable conflicts of interest, to be sued, along with itself.

In the second place, the cases specifically cited and discussed by Respondents do not deal with a decision on the merits of a substantive claim adverse to the Friday Firm. They deal with instances where Summary Judgments were either upheld, or reversed, so that said proceedings went to trial on the merits. In fact, the only case where the Friday Firm was more than an attorney of record is *Pope County v. Friday, Eldredge and Clark*, 313 Ark. 83, 852 S.W. 2d 114 (1993) which simply held that a legal malpractice case could proceed on the merits and was not barred by limitations. The underlying litigation is still pending. If one were to take the Respondent's approach, one could argue that there was

the opportunity to "pick and choose" which cases were picked for favoritism and in what manner said favoritism was craftily disbursed.

In the third place, a computer search of cases involving the Friday Firm wherein either Judge Holt, or his Uncle, the Honorable Frank Holt, actually *wrote* the Opinion, indicates numerous times wherein the Friday Firm unequivocably benefited. (*See* Appendix 2a). Petitioner is *not* arguing that in these cases there was a conspiracy to benefit the Friday Firm; he is simply showing the futility of arguing statistics or numbers. How far does it go, and where does it stop? The reason one only has to show the "appearance of an impropriety" is to remove the need to show an *overt* act of favoritism. Same could rarely, if ever, been proven.

Respondent's faulty argument, and the numerous cases involving the Friday Firm it has caused to be cited, can be used legitimately. They prove the Friday Firm has *many* cases pending in front of the Arkansas Supreme court at all times, and it is absolutely improper for the senior partners of said firm to privately socialize with its Justices at *any* time.

CONCLUSION

The Petitioner's statements are correct. The facts stand on their own, and raise the appearance of an impropriety. There is no difference in what transpired here and the Chief Justice of the Colorado Supreme Court going on repetitive snow skiing excursions at a private and exclusive lodge with the senior partner of the largest law firm in Denver while a matter of utmost significance to said firm was pending, and on which said Chief Justice was the designated author of the applicable Opinion.

The Friday Firm indicated , at the same time these excursions came to light, that it believes the Arkansas Supreme Court's Opinion insulates if from exposure to the Estate in the proceedings

currently being pursued against that firm. Said firm will still try to use said Opinion offensively, in the Estate's case against it, if this Petition for Writ of Certiorari is denied. Something about these facts and circumstances is improper to anyone who will listen.

The facts asserted by the Petitioner will be independently verified. The proceedings before the Arkansas Supreme Court should have been stayed until this matter was independently investigated. The only way to remove the cloud, and let this man rest in peace, is to have this matter reheard by 7 impartial Justices appointed by the Governor of the State of Arkansas. It has been done before under circumstances not as compelling as those present in the case at bar.

Finally, the issue is *not* the potential impact "doing what is right" may have on other cases, or the reputation or client list of the individual/entities involved. At stake is the right of all citizens to receive fair and impartial reviews from a judiciary *whose impartiality cannot be questioned.* This is not a situation where a State Supreme Court simply misapplied that State's law; the Petitioner's constitutional right to due process has been violated. The Petitioner seeks the only means of redress available to him, and asks that this Court not turn its back on him.

Respectfully submitted,

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APPENDIX A — PERTINENT PORTIONS OF JOHN PEACE'S MEMORANDUM FOR FIRST PYRAMID LIFE DATED JANUARY 18, 1978

RELEVANT FACTS

First Pyramid issued a $1,950,000 life insurance policy insuring the life of James Patrick Stoltz ("the insured"). There is some confusion over who owned the policy and also over who is the beneficiary. Some evidence points to the fact that the insured's estate ("the estate") is the beneficiary (the policy itself appears to name the estate). . . .

However, if First Pyramid makes payment to the son, and a Court later found that the decedent intended the estate to be the beneficiary, I believe the estate could show that it had been damaged by the face amount of the policy which it did not receive. This is what happened in the *Sovereign Camp* case mentioned above.

APPENDIX B — CASES

Arkansas Alcoholic Beverage Control Bd. v. King, 275 Ark. 308, 629 S.W.2d 288 (1982);

Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986);

Smith v. Nelson, 255 Ark. 641, 501 S.W.2d 769 (1993);

Super X Drug Corp. v. Knight, 263 Ark. IV-90 (not for publication);

Baxter County Newspapers v. Medical Staff of Baxter General Hospital, 273 Ark. 511, 622 S.W.2d 495 (1981);

Lambert v. Snelling & Snelling, Inc., 253 Ark. 1008, 490 S.W.2d 116 (1973);

Madison Bank & Trust v. First National Bank of Huntsville, 276 Ark. 405, 635 S.W.2d 268 (1982);

Pearson v. Lake Lawrence Pulpwood Co., 247 Ark. 776, 447 S.W.2d 661 (1969);

Voss v. Wara's Pulpwood Yard, 248 Ark. 465, 452 S.W.2d 629 (1970);

Cherokee Village Homeowners Protection Assoc. v. Cherokee Village Road and Street Improvement Dist. No. 1, 248 Ark. 1055, 455 S.W.2d 93 (1970);

First Federal Savings & Loan Assoc of El Dorado v. Union Fidelity Savings & Loan Ass'n., 257 Ark. 199, 515 S.W.2d 75 (1974);

Appendix B

Valley Metals, Inc. v. A.O. Smth - Inland, Inc., 264 Ark. 341, 572 S.W.2d 138 (1978);

Knopf v. Knopf, 264 Ark. 946, 576 S.W.2d 193 (1979);

Sugg v. Continental Oil Co., 270 Ark. 882, 608 S.W.2d 1 (1980);

Daniels v. City of Forth Smith, 268 Ark. 157, 594 S.W.2d 238 (1980);

Barentine v. Gleghorn Oil Co., 254 Ark. 182, 492 S.W.2d 242 (1973);

Cople v. Kroger, 260 Ark. N-468;

Teer v. Central Maloney, Inc., 1979 WL805;

Dicks v. Noff, 255 Ark. 357, 500 S.W.2d 350 (1973).